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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SHONTA LATRICE RICHARDS, Defendant and Appellant.	B211014 (Los Angeles County Super. Ct. No. YA070158)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hector M. Guzman, Judge. Affirmed.

Kathleen M. Redmond, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Shonta Latrice Richards appeals from the judgment entered following a jury trial in which she was convicted of second degree commercial burglary (Pen. Code, § 459).[1] She was sentenced to prison for the low term of one year and four months and contends the trial court abused its discretion in refusing to place her on probation. She claims the court's comments and refusal to follow the recommendation of the probation officer indicate the court was punishing her for exercising her constitutional right to testify in her own defense. For reasons stated in the opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On December 10, 2007, at approximately 8:15 p.m., Angelina Palmas, a loss prevention agent for Macy's Department Store in Redondo Beach, observed appellant in the store quickly selecting items without checking prices and putting the items in a cart. Palmas went to the camera room to continue watching appellant and saw her go to the second level of the store. Appellant met codefendant Alshonda Jatrice Jordan and both got into the line of cashier and codefendant Valencia Alicerenee Pitts. Appellant took some of the items out of her cart and placed them on the counter. Codefendant Pitts removed the sensors from items, scanned some but not all of the items and placed the items in bags. While ringing up the scanned items, Pitts applied discount coupons to some of the items. After appellant exited the store, she was detained. Appellant paid $138.88 in cash for merchandise valued at $2,002.45, for a loss of $1,863.57.

Appellant testified in her own defense that she went to Macy's with codefendant Jordan and Robin Pitts, codefendant Pitts's mother. Appellant had coupons that she could use at the store. Some were "friends and family," some were 25 percent off $100, and some were 50 percent off clearance items. Appellant helped Robin Pitts, who had trouble walking, and got her a cart that she could lean on. Appellant and Robin Pitts spent about 40 minutes in the Misses Department because Robin Pitts wanted to get an outfit. Appellant picked out items and put them in the cart. They went to the Children's

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[1] The jury deadlocked on count 2, grand theft of personal property (Pen. Code, § 487, subd. (a)) and that count was dismissed.

Department and appellant helped Robin Pitts pick out items and placed the items in the cart. They then went downstairs to the Men's Department, where appellant picked out an outfit for her husband and one for her son and put them in the cart. When they finished shopping, they went to codefendant Pitts's cash register. Appellant put everything she was purchasing on the counter and gave the coupons to codefendant Pitts. Appellant attempted to pay for the items with her Macy's credit card, but learned the credit card was not accepted because the credit card scanner was not working. When codefendant Pitts told appellant the total, appellant said she could pay for the items in cash and gave Pitts $140 in cash. The counter was high and appellant could not see the items that were being rung up, scanned, having sensors removed, and being placed in bags. Appellant did not take an inventory of what was in the bags. Appellant waited for Robin Pitts to return from the restroom and she never did. Appellant walked around looking for Pitts and then was detained as she attempted to leave the store. She was taken to the security room, handcuffed, and her bags were emptied onto the floor. Appellant was left sitting in the office for approximately three hours.

On cross-examination, appellant testified she picked out five items for herself and never put these five items in the cart. The cart was for Robin Pitts. Appellant put her items on the upper counter and never took items out of the cart. Items were never taken out of the cart in her presence. There was a jacket in one bag and the other four items were in three other bags.

Following the weekend and when cross-examination resumed, appellant testified she had six or eight items and did not remember testifying on Friday that she had four or five items. If she had testified she had five items, it was a mistake. Additionally, appellant now testified that codefendant Jordan, her daughter, had taken the items out of the cart and put them "on the cash register" at the request of codefendant Pitts. After appellant's items were rung up, Robin Pitts returned from the bathroom. In 1991, appellant was convicted of theft of personal property and in 1993, of forging a name on an access card. Appellant claimed codefendant Pitts and Robin Pitts "basically did

everything." Appellant did not go in the store to steal anything. Appellant did not know what codefendant Pitts was doing.

DISCUSSION

At the probation and sentencing hearing, the prosecution argued the factors in aggravation were the planning and sophistication of the offense, that this was a case in which appellant conspired and planned and committed the crime with two other codefendants, involving the theft of over 60 items. The prosecution argued appellant's prior record was either a mitigating factor, because appellant suffered the convictions in the early 1990's, or a factor in aggravation because the crimes were very similar to the instant crimes. As another factor in mitigation, the prosecution observed appellant had successfully completed probation. The prosecution also argued that appellant's deliberate attempt to mislead the court and jury should be considered in determining the appropriate sentence, noting appellant's testimony on Friday was very different from her testimony the next Monday.

Appellant's counsel disagreed and claimed appellant was testifying as to her version of the events. Counsel argued that apparently some of the jurors felt appellant was credible in that the jury was unable to reach a verdict in count 2. Counsel argued the probation department indicated appellant was eligible and suitable for probation, she had a good work background, her income was vital to her family, she had been crime-free for over 16 years, she was married and her husband came to court faithfully, and she had an eight-year-old son.

In making its selection, the court stated appellant's record was not so bad that its only option was to deny probation and send her to prison. "[C]utting to the chase, it's a combination of factors that make this case a difficult case. . . . [¶] Prior to her testimony, it was an easier case. Her testimony really changed things in my mind in this case. It really did – and not to her favor. And I'm not saying that an individual does not have the right to put the People to the task of having them prove their case. I would never punish anyone for that. Never. But when an individual takes the stand, and in my opinion, is not honest, and it's clear they're not being honest, then that is disturbing to the court and it

changes the balance on how the court decides whether probation is appropriate or not, and if not appropriate, what sort of sentence the court should impose." When asked if the court was seeing itself as a 13th juror, the court responded that it had "listened to the evidence, like the jury did. The jury decided the case. They convicted her in count 1." When defense counsel observed the jury had not convicted her on the grand theft charge, the court opined it might have been based on an inability to find that the amount of merchandise she was actually responsible for exceeded $400.

In denying probation, the court stated that while it was "all for rehabilitation," appellant "has yet to step forward and indicate that she is remorseful for what happened. One, I think her remorse is more so she got caught and [is] now facing time. And two, that my sense is from reading her statement to the probation officer, she still doesn't come to grips with the facts that her testimony in this case was just not truthful.[2] And she took a chance, and she rolled the dice, and she lost. I don't feel that in this case, and again, it's a close call, that probation is appropriate. Probation is denied."

The court concluded with its reasons for denying probation, stating appellant's criminal history was a factor in that in 1993, she was convicted of the same felony; the monetary value of the merchandise stolen was over $3,500,[3] a total of approximately 60 items; and in the court's opinion, it was not even a close call that appellant was not truthful in her testimony.

Appellant contends the trial court abused its discretion in refusing to place her on probation and the court's comments and refusal to follow the recommendation of the

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[2] When appellant was interviewed by the probation officer, she stated, inter alia, she "is extremely sorry for what has happened in this case. . . . [She] stated that she made a terrible error and should not have gone along with what happened. [She] states she knows she is wrong, and must face the consequences, but hopes the court can understand that she has an eight-year-old child, who needs her badly. . . . [She] states she knows she must face a consequence, and hopes the court will show her mercy, and let her get probation."

[3] The court included the value of the property taken by codefendant Jordan.

probation officer indicated the court was, in effect, punishing appellant for exercising her constitutional right to testify in her own defense. We disagree.

"Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation. [Citations.] The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) "The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]" (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) "'Abuse of discretion,' in turn, depends on whether the trial court's order '"exceeds the bounds of reason."' [Citation.]" (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1225.)

Criteria affecting the decision to grant or deny probation include the degree of monetary loss to the victim, the prior record of criminal conduct and whether the defendant was remorseful. (Cal. Rules of Court, rule 4.414(a)(5), (b)(1), (b)(7).) Further, "[a] trial court's conclusion that a defendant has committed perjury may be considered as one fact to be considered in fixing punishment as it bears on defendant's character and prospects for rehabilitation. [Citation.] In an effort to appraise a defendant's character '"a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia." [Citations.]"' (*People v. Redmond* (1981) 29 Cal.3d 904, 913-914.) While one has the right to testify on one's own behalf in a criminal proceeding, "a defendant's right to testify does not include a right to commit perjury. [Citations.]" (*United States v. Dunnigan* (1993) 507 U.S. 87, 96.)

Here there was no abuse of discretion in denying probation. Apart from the other reasons given by the court for denying probation, the trial court's consideration of appellant's false testimony in assessing her character and prospects for rehabilitation was proper. (See *People v. Redmond, supra,* 29 Cal.3d at p. 913-914; *People v. Montano* (1992) 6 Cal.App.4th 118, 121-123; *In re Perez* (1978) 84 Cal.App.3d 168, 172.)

Consideration of appellant's false testimony in determining her eligibility for probation did not amount to punishment for an uncharged perjury offense for which there was no conviction. (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002-1003; *United States v. Grayson* (1978) 438 U.S. 41, 54-55.)

DISPOSITION

The judgment is affirmed.

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MANELLA J.

We concur:

WILLHITE, Acting P.J.

SUZUKAWA, J.